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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 75

FRANK LEE, As Commissioner of Corrections of Alabama; JOHN F. BRITTON, CHARLIE CASHION, HERSCHELL LUTTRELL, DR. MAX McLAUGHLIN and WILLIAM MITCH, As Members of the Board of Corrections of Alabama; and ROBERT K. AUSTIN, As Warden of the City Jail of Birmingham, Alabama,

APPELLANTS

—vs—

CALIPH WASHINGTON, HOSEA L. WILLIAMS, JULIA ALLEN, individually and as Mother and Next Friend of Willie Allen, a minor, WILLIE ALLEN, AGNES BEAVERS, individually and as Mother and Next Friend of Cecil McCargo, Jr., a minor, CECIL McCARGO, JR., JOHNNIE COLEMAN and THOMAS E. HOUCK, JR.,

APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION, SITTING AS A THREE-JUDGE DISTRICT COURT

APPELLANTS REPLY BRIEF AND EXHIBITS (Newspaper Articles)

OF COUNSEL:

MacDONALD GALLION,
Attorney General of the
State of Alabama

GORDON MADISON,
Assistant Attorney General of the
State of Alabama

NICHOLAS S. HARE,
Special Assistant Attorney General
of the State of Alabama

J. M. BRECKENRIDGE, City Attorney
for the City of Birmingham,
Attorney for Robert K. Austin, As
Warden of the City Jail of
Birmingham, Alabama, Appellant

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REPLY BRIEF

The traditional reluctance of the Courts to interfere with prison administration is solidly based on sound and valid reasons.

Prisoners, prison employees and the public are entitled to prison operation that will best insure prison discipline and security. And, that can be provided within the frame work of the law, including the Fourteenth Amendment. No single claimed right should be permitted to take precedence over the principal objective of keeping the prisoners safe from harm.

It has always been recognized that the prison authorities are under a positive duty to use reasonable diligence to prevent prisoners from inflicting injuries on each other.

As has been pointed out in previous briefs, numerous rights are indeed lost to prisoners by the very nature of incarceration; but, of course, numerous rights still remain—certainly the right to be humanly treated, the right to safety, and numerous other rights including those related to the Fourteenth Amendment, which rights in short involve protection from invidious racial discrimination.

All of these separate rights must be kept in balance, and it can be expected that at some times one right must temporarily yield to others, if the circumstances require it.

We have in this case an illustration of a legitimate area for the exercise of administrative discretion. It would be wrong, and even dangerous, for this court to upset the time honored, judicially recognized, principle permitting wide administrative discretion in an effort to stop one alleged invidious practice, particularly when you can insure the end of that alleged practice by a simple and clear declaration of the law. Your declaration of the law will be followed by reviews of those instances allegedly requiring correction as they occur in the future. You can in that way achieve justice and best insure safety and order.

For the Court to arbitrarily end racial segregation even though special circumstances in the future might show separation prudent, would be both unwise and injudicious. It has been argued that the State Legislature by statutes arbitrarily segregated the prisoners; now it is being urged that this Court just as capriciously make racial separation impossible by an inflexible fiat.

This Court can order the abolition of all arbitrary, unreasonable, capricious racial separation without taking the final and irretrievable step which was decreed by the lower Court.

Even the schools, which cannot be compared with prisons, were integrated with "deliberate speed". The orderly development, or the prudent evolution, of the law calls for a case by case review of the many varying factual situations as they arise. The order of the lower Court goes both too far and too fast.

The Alabama prison system is antiquated and over-crowded, frequently twelve people are confined to a cell, and as many as

150 people in one barracks. The new prison facilities are contracted to be completed in July, 1969; and it is reasonable to assume that some time will be required even thereafter. The Court must consider that the jail and prison systems of some other states may be even worse.

The theory of Brown v. Board of Education can not be applied to prisons; i.e. separate educational facilities are inherently unequal. In fact it can not be flatly stated that separate cells are inherently unequal. And, racial separation is not always discrimination.

The lower Court decree must be modified so that the final order will not preempt legitimate administrative discretion: prison officials still need reasonable discretion, not because the prisoners are white or black, but because they are dangerous.

You are not talking about school children; many of these men are vicious, violent, rebellious and deadly. In that regard, the lower Court attempted to distinguish between maximum security prisons, minimum security prisons and jails.

In the first place the lower Court's finding of fact (Order of Lower Court, paragraph IV) that Draper Correctional Center and Julia Tutwiler Prison for Women house only minimum or medium security prisoners is incorrect, and dangerously incorrect, for both institutions have many dangerous prisoners. Even jails are constantly holding some of the most dangerous prisoners — not just those prisoners kept for misdemeanors — for all prisoners are first jailed, whether they be the mass murderers, the criminally insane, or the like. They are later (after a trial or hearing) transferred to prisons or to insane institutions. This merely illustrates the lack of careful consideration given by the lower courts in its head-long effort to effect an immediate social change.

In Loving v. Virginia 388 U. S. 1, 18 L. ed 2d 1010, 87 S. Ct. 1817, 35 Law Week 3679, decided June 12, 1967, the Court held that the statutes there considered (miscegenation) "rest solely upon distinctions drawn according to race", and in the words of the Chief Justice " . . . at the very least, the Equal Protection Clause demands that racial classifications, especial-

ly suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' . . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which was the object of the Fourteenth Amendment to eliminate'. If the Alabama prison segregation statutes are voided by court declaration the remaining administrative discretion to reasonably segregate prisoners if and when necessary is certainly not "invidious" discrimination, racial or other. Moreover, when the separation, even by race, is necessary to a permissible state objective, viz, the accomplishment of prison order, discipline and security, it must be permitted.

The Court can take judicial or common knowledge of newspaper reports of prison riots and violence, some racially inspired, some not. Merely to refresh the Court's recollection of a few of such news reports, the Exhibit is attached.

Respectfully submitted,

MacDONALD GALLION
Attorney General of the
State of Alabama

GORDON MADISON
Assistant Attorney General
of the State of Alabama

NICHOLAS S. HARE
Special Assistant Attorney General
of the State of Alabama

J. M. BRECKENRIDGE, City Attorney
for the City of Birmingham,
Attorney for Robert K. Austin,
As Warden of the City Jail of
Birmingham, Alabama, Appellant.

CERTIFICATE OF SERVICE

I, Nicholas S. Hare, one of the attorneys for the said appellants, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1967, I served copies of the foregoing Brief for Appellants by mailing in duly addressed envelopes, with first class postage prepaid (airmail where necessary), to the following attorneys for appellees:

Hon. Charles Morgan, Jr.
5 Forsyth Street, N. W.
Atlanta, Georgia

Hon. Orzell Billingsley, Jr.
1630 Fourth Avenue, North
Birmingham, Alabama

Hon. Melvin L. Wulf
156 Fifth Avenue
New York, New York

Messrs. Dominick, Fletcher and Yeilding
927 Brown Marx Biulding
Birmingham, Alabama

NICHOLAS S. HARE
Special Assistant Attorney General
of Alabama
Tyson Building
Montgomery, Alabama 36104